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No. _____

In The

Supreme Court of the United States

SPENCER WILLIAMS, LOUIS C. BECHTLE, SANDRA S. BECKWITH, WILLIAM MATTHEW BYRNE, JR., ADRIAN G. DUPLANTIER, MORRIS E. LASKER, THOMAS COLLIER PLATT, JR., JOHN W. REYNOLDS, WALTER HERBERT RICE, MARVIN H. SHOOB, JOSEPH L. TAURO, LAUGHLIN E. WATERS, LEE R. WEST AND HENRY RUPERT WILHOIT, JR.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where Congress has enacted a law intended to protect judges' salaries from inflation by mandating salary adjustments to be received in the future, may a later Congress stop payment of those adjustments and thereby directly reduce the statutory salaries of Article III judges, without violating the Compensation Clause?

2. Whether this Court in *United States v. Will*, 449 U.S. 200 (1980), held that the Compensation Clause is to be read narrowly to protect only the salaries currently being received by judges?

PARTIES TO THE PROCEEDINGS

Petitioners, who were plaintiffs in the district court and appellees in the court of appeals, are Judges Spencer Williams, Louis C. Bechtle,* Sandra S. Beckwith, William Matthew Byrne, Jr., Adrian G. Duplantier, Morris E. Lasker, Thomas Collier Platt, Jr., John W. Reynolds, Walter Herbert Rice, Marvin H. Shoob, Joseph L. Tauro, Laughlin E. Waters, Lee R. West and Henry Rupert Wilhoit, Jr.

In addition, six judge plaintiffs in the original actions died while the cases were proceeding in the lower courts. They are: Judges Aubrey E. Robinson, Jr., C. Clyde Atkins, Lucius D. Bunton, III, Irving Hill, Joseph E. Stevens, Jr. and Charles Wiggins.

Respondent, United States of America, was a defendant in the district court and appellant in the court of appeals.

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* Judge Bechtle retired from active service pursuant to 28 U.S.C. § 371(a), effective June 30, 2001.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The decision of the United States District Court granting judgment for plaintiffs in case no. 97 CV 3106 (App. 103-31)[1] is reported at 48 F. Supp. 2d 52 (1999). A subsequent opinion granting judgment in a related case, no. 99 CV 1982 (App. 144-48), is not reported. The majority decision of the Court of Appeals for the Federal Circuit reversing those judgments (App. 1-41) and the dissenting opinion (App. 42-99) are reported at 240 F.3d 1019 (2001). A separate opinion by the panel majority concurring in the full court's order denying initial hearing *en banc* (App. 163-64) is reported at 240 F.3d 1366 (2001). Separate opinions dissenting from the court's order denying initial hearing *en banc* (App. 151-62) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 2001. A timely petition for rehearing was denied on April 30, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Compensation Clause of Article III, Section 1, of the United States Constitution provides that "[t]he

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[1] "App." refers to the separate, bound appendix to this petition.

Judges, both of the supreme and inferior Courts, . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Pertinent provisions of the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716, and the statutes that barred payment of the annual cost-of-living adjustments in each year at issue are reproduced in the Appendix to this petition. (App. 169-80).

STATEMENT

1. In 1989 Congress enacted the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716 [hereinafter "Ethics Reform Act"], a statute that significantly affected the compensation of federal judges. The statute adversely affected judges by imposing strict limitations on outside income they might earn from teaching or writing. Ethics Reform Act § 601 (codified at 5 U.S.C. app. §§ 501(a), 502) (App. 169-71). The statute also forbade the receipt of honoraria and imposed mandatory work loads on senior judges. *Id.* §§ 601 and 705 (codified at 5 U.S.C. app. § 501(b) and 28 U.S.C. § 375) (App. 170, 175-78). These limitations went into effect on January 1, 1991, and have applied to judges in each and every year since. In a related provision, designed, in part, to mitigate the adverse financial impact of these changes and to afford judges some protection from erosion of their compensation due to inflation, the Ethics Reform Act provided that judges would receive a cost-of-living adjustment ("COLA") each year, based on an index commonly used for this purpose, the Employment Cost Index, or ECI.[2] *Id.*

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[2] The ECI is a quarterly index of wages and salaries for private industry workers published by the Bureau of Labor Statistics. The Ethics Reform Act adopted the ECI less one-half percent as the measure of the appropriate adjustment. *See* Ethics Reform Act § 704(a)(1) (codified at 5 U.S.C. § 5318 note) (App. 173-74). It also capped any increase at 5 percent. *Id.*

§ 704(a)(2)(A) (codified at 28 U.S.C. § 461(a)) (App. 174-75). As discussed *infra*, the adoption of this index has the same legal effect as the adoption of a specific salary schedule for future years. *See infra* pp. 22-23.

The adoption of the Ethics Reform Act and its COLA provision came on the recommendations of the 1989 Commission on Executive, Legislative and Judicial Salaries ("1989 Quadrennial Commission") and a Bipartisan Task Force on Ethics which had been appointed by Congress. *See Report of the Bipartisan Task Force on Ethics on H.R. 3660, Government Ethics Reform Act of 1989*, 135 Cong. Rec. H30,740 (1989) [hereinafter "Task Force Report"]. The Task Force found that failure to implement cost-of-living adjustments under the prior law was "the single, most important explanation for the growing disparity between top salaries in government and the private sector, and the 38% loss of purchasing power by these officials since 1969." *Id.* at H30,753. The Task Force proposed that a new system be adopted that would provide for annual salary adjustments for judges and other high level government employees using the ECI as the appropriate measure. *Id.*

Congress followed this recommendation and mandated that payments under the new schedule commence on January 1, 1991. Ethics Reform Act § 704(b) (codified at 5 U.S.C. § 5318 note) (App. 175). The only condition to payment of the ECI adjustment for judges in any year was that the salaries of General Schedule employees be adjusted under the Federal Pay Comparability Act (5 U.S.C. § 5303 [hereinafter "Comparability Act"]), a statute

that provides a procedure for annually adjusting the salaries of federal employees under the General Schedule.

General Schedule salaries were adjusted under the Comparability Act for Fiscal Years 1991, 1992 and 1993 and, by operation of the Ethics Reform Act, judges' salaries were likewise adjusted in each of those years.

In Fiscal Year 1994, General Schedule salaries were not adjusted under the Comparability Act. Congress enacted a government-wide ban on any adjustments that year. Act of Oct. 28, 1993, Pub. L. No. 103-123, § 517B(a), 107 Stat. 1253. Thus, the sole condition for payment of the ECI adjustment to judges under the Ethics Reform Act was not met and, accordingly, judicial salaries were not adjusted.

In each of Fiscal Years 1995, 1996, 1997 and 1999, the sole condition for judicial ECI adjustments was satisfied, *i.e.*, the salaries of General Schedule employees were adjusted under the Comparability Act. Judges did not receive ECI adjustments, however, because Congress adopted, and the President signed, resolutions which purported to block payment of the scheduled COLAs.[3] These resolutions, referred to by the court of appeals as "blocking statutes" (App. 2), were contained in annual appropriations bills and applied only to judges, Members of Congress and a comparatively small group of policymaking positions included in the Executive Schedule. (*See* App. 57). Virtually all other federal employees received COLAs in each of the years at issue. Each of the blocking statutes acknowledged that the adjustments under the Comparability Act (the only condition for judges' COLAs) had taken effect. (*See infra* p. 24 n.17).

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[3] The four enactments that blocked these payments are set out in the Appendix. (App. 179-80).

While the resolutions purported to withhold the adjustments due judges under the Ethics Reform Act, the statute's related ban on honoraria and its limitations on other outside income continued to apply in each of the years at issue. (*See infra* pp. 13-14).

2. On December 27, 1997, twenty Article III judges filed suit against the United States in the District Court for the District of Columbia. The jurisdiction of the district court was invoked under 28 U.S.C. § 1346(a)(2) (the Little Tucker Act) and 28 U.S.C. § 1331 (federal question). (App. 85-86). In their complaint, the judges contended that they were entitled to the mandated COLAs for each of the years 1995, 1996 and 1997 because the blocking statutes adopted by Congress in each of these years reduced their compensation in violation of the Compensation Clause. (Complaint, Case No. 97 CV 3106 (*"Williams I"*)).[4] The judges also alleged that the refusal to pay COLAs to judges at times when COLAs were paid to millions of other career federal employees was discriminatory in violation of Article III. (App. 187-88). On plaintiffs' motion, a class was certified consisting of all persons who had served as Article III judges during the relevant periods. (App. 100-02).[5]

The parties filed cross-motions for summary judgment, and the district court entered summary judgment in favor of the plaintiff-judges on July 15, 1999. (App. 103-33). The district court held that the COLA mandated by the Ethics Reform Act is a protected component of judges' compensation, subject only to the condition in the

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[4] The pertinent portions of the complaint in *Williams I* are found in the Appendix. (App. 181-91).

[5] Although the judges of the courts below and the Justices of this Court have an interest in the outcome of these cases, no member of the Court is disqualified. *See United States v. Will*, 449 U.S. 200, 211-17 (1980).

statute, *i.e.*, that General Schedule salaries be adjusted. Therefore, the Acts of Congress which purported to block payment of these adjustments after all statutory prerequisites had been satisfied diminished judicial compensation and were invalid. On July 26, 1999, a similar case was filed by the same judges when Congress blocked payment of the 1999 COLA, despite the payment of General Schedule salary adjustments under the Comparability Act. (Case No. 99-1982 (*"Williams II"*)). The district court granted summary judgment in *Williams II* on December 29, 1999. (App. 136-37).

The government appealed both judgments to the Federal Circuit, and the appeals were consolidated for hearing and decision by that court. The jurisdiction of the Federal Circuit was invoked under 28 U.S.C. § 1295(a)(2).

3. A divided panel of the Federal Circuit reversed the judgments of the district court on February 16, 2001. (App. 1-41). All three members of the panel agreed with plaintiffs that, when the 101st Congress adopted the Ethics Reform Act, it intended to set salaries for 1991 and subsequent years by establishing "an automatic, *irreversible*, COLA-granting mechanism for federal judges, contingent only upon the grant of a COLA to the General Schedule." (App. 20 (emphasis supplied)). The full panel also agreed that the only condition for payment of the COLAs had been met in each year at issue before Congress enacted the blocking statute. (App. 20, 23). Thus, for example, before Congress moved to block payment of the 1995 COLA on September 30, 1994 (App. 179), judges' statutory salaries for Calendar Year 1995 had been adjusted (increased) by law and the blocking statute directly reduced that salary.

The panel majority held that this direct reduction in judges' statutory salary did not violate the Compensation Clause. They reasoned that, while one Congress may set

judicial salaries, a later Congress may change (reduce) those salaries without offending the Compensation Clause, so long as it does so before the amounts set are actually received by the judges. (App. 40). The panel majority believes that this is so because, under a "rule" they attribute to this Court by its opinion in *United States v. Will*, 449 U.S. 200 (1980) (*"Will"*), no element of judges' compensation to be received at a future date is protected by Article III. (App. 24-26). A sitting Congress is thus powerless to fix future salaries for judges, and legislative enactments that purport to do so are merely unenforceable "wish[es]." (App. 20). That related limitations on outside income remained in force and effect was deemed by the majority to be irrelevant because, in their view, Congress may limit or "reduce nonjudicial compensation" without offending the Compensation Clause. (App. 37).

The third member of the panel, Judge S. Jay Plager, dissented. Judge Plager wrote that, in his judgment, Congress has the power to fix future salary levels in a manner that protects those salaries from diminution and that, in holding otherwise, the panel majority misinterpreted this Court's opinion in *Will*. "[The majority opinion] is wrong because it attributes to the Supreme Court a misconstruction of the Constitution that the Court's opinion in *Will* neither supports nor deserves. . . . " (App. 42). Judge Plager also expressed the view, contrary to the majority, that the limitations on outside income were relevant factors in construing and applying the 1989 Act and that, so long as those limitations were in place, a later Congress could not withdraw the related COLA payments provided for by the same law. (App. 48).

Before the appeals court judgment was entered, a member of the Court suggested that the appeal be heard *en banc*. A majority voted not to consider the case *en banc*.

(App. 149-50). Three active members of the court (Chief Judge Mayer and Circuit Judges Newman and Rader) dissented. In written opinions,[6] these judges agreed with Judge Plager that the majority had misread *Will*, and they expressed the view that the decision of the district court should be affirmed. (App. 151-62).

4. On March 15, 2001, plaintiffs filed a petition for rehearing and suggestion for rehearing *en banc*. On April 30, 2001, the Federal Circuit denied both plaintiffs' petition for rehearing and their request for rehearing *en banc*. (App. 165-66). Judges Mayer, Newman and Rader again dissented. (*Id.*). After this Court issued its decision on May 21, 2001, in *United States v. Hatter*, No. 99-1978, 532 U.S. ___ (May 21, 2001), plaintiffs filed a motion for leave to file a second petition for rehearing and suggestion for rehearing *en banc* to allow the Federal Circuit to consider the application of this Court's decision in *Hatter* to the decision in this case. That motion was denied on May 29, 2001. (App. 167-68).

REASONS FOR GRANTING THE PETITION

This case is the most important Compensation Clause case ever to come before this Court. The decision of the majority below is the first to allow a Congress to directly reduce judicial pay once that pay has been enacted into law.[7] This holding alone should cause concern sufficient

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[6] Chief Judge Mayer issued a dissenting opinion in which Judges Newman and Rader joined. (App. 151-58). Judge Newman issued a separate dissenting opinion in which Chief Judge Mayer and Judge Rader joined. (App. 159-62).

[7] *United States v. Hatter*, No. 99-1978, 532 U.S. ___ (May 21, 2001), *O'Malley v. Woodrough*, 307 U.S. 277 (1939), *Miles v. Graham*, 268 U.S. 501 (1925), and *Evans v. Gore*, 253 U.S. 245 (1920), involved indirect reductions in judicial compensation as a result of taxation. In *Booth v. United States*, 291 U.S. 339 (1934), and *O'Donoghue v. United States*, 289 U.S. 516 (1933), the issue was whether certain judicial offices were covered by Article III; Congress had reduced the salaries of all government employees, but acknowledged that it could not reduce the salaries of Article III judges. In *United States v. Will*, 449 U.S. 200 (1980), the issue was whether certain adjustments had become law and, therefore, part of the statutory salary of a judge. (*See infra* pp. 25-28).

to merit review by this Court. But the ruling here is of special concern because the panel majority attributes every aspect of their holding to the teachings of this Court in *United States v. Will*, and they have called upon this Court to review and reverse their decision if they are wrong. (App. 164). The panel majority's reading of *Will* is clearly wrong. If allowed to stand, without review by this Court, their decision will be read as *the* authority on the protective limits of Article III, even though a number of judges on the Federal Circuit disagree with the panel majority's erroneous reading of *Will*. (*See infra* p. 14).

The COLA provisions, which the panel majority found to be unenforceable, were enacted by Congress at the urging of many organizations and institutions interested in enhancing the quality and independence of the Judicial Branch, including The Judicial Conference of the United States. (*See infra* pp. 19-22). These proponents emphasized that COLAs were essential to preserve the quality and independence of the judiciary.

The 101st Congress responded to these concerns by enacting the COLA provisions of the Ethics Reform Act. The majority decision below has nullified this commendable effort by that Congress. In the process, the majority has relegated the Judicial Branch to a permanent state of subservience and dependence.

I. THE MAJORITY OPINION UNDERMINES JUDICIAL INDEPENDENCE AND THE POWER OF CONGRESS TO PROMOTE THAT INDEPENDENCE.

The panel majority recognizes that the Ethics Reform Act mandated that the salaries of Article III judges were to be adjusted in each of the years at issue and that all conditions for payment of those adjustments had been satisfied. (App. 20, 23). The majority concluded, however, that Congress has the power to bar the mandated adjustments and thereby reduce judicial salaries, so long as it does so before the mandated salary is actually received. Thus, contrary to the commands of this Court that the Compensation Clause be read broadly, in a way that achieves its objectives (*e.g., O'Donoghue v. United States*, 289 U.S. 516, 530-33 (1933)), the panel majority adopted the narrowest possible reading of the Clause; it protects only a judge's current salary as reflected by his or her "paycheck[ ]." (App. 25).

The fundamental error of the decision below rests on the premise that no element of compensation to be received in the future can be protected by the Compensation Clause. Under the panel majority's construction of the term "compensation," as it appears in Article III, Section 1, Congress is powerless to establish an irrevocable future rate of pay for judges. So long as the majority decision survives, judges and prospective judges can *never* be assured that their salaries will be protected from inflation, no matter how clearly Congress may express its intention to provide such protection. By the same logic, retirement benefits measured by a judge's salary at the time of retirement (*see, e.g.*, 28 U.S.C. § 371) can be eliminated at any time before the judge's retirement, since retirement benefits are neither determined nor payable until the judge retires. To this extent, at least, the majority

decision is in direct conflict with this Court's recent decision in *United States v. Hatter*.[8]

The panel majority, of course, recognizes that Congress can, when fixing salaries, provide for payments to be received in future years. The panel majority believes, however, that – under their interpretation of the rule of *Will* – such future payments are always subject to rescission because the power of Congress to fix salaries includes the power to change (or repeal) the salaries fixed by an earlier Congress. (App. 40). According to the panel majority, any enactment fixing a salary level to be received at a future date is an unenforceable "wish" (App. 20) that can be honored or repudiated by a later Congress. This principle, too, they say, is part of the "rule" in *Will*. (App. 25).

Petitioners recognize that, as a general rule, legislation enacted by one Congress can be rescinded by a later one. But this rule is not absolute. As this Court explained in *United States v. Winstar Corp.*, 518 U.S. 839 (1996), there are many exceptions, particularly where a right or entitlement has been created by the initial enactment. The majority's application of the rule (as an absolute one) overlooks the fact that Article III was specifically designed and intended to limit the power of Congress to

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[8] The Opinion of the Court in *Hatter* recognized that more than salary was protected. It identified a salary reduction as merely one example of an unconstitutional diminution, noting that the "Compensation Clause offers protections that extend beyond [reductions in salary]." *Hatter*, slip op. at 10. *See also id.* at 15 (non-contributory pension benefits are part of judges' compensation). Justice Scalia's separate opinion, concurring in part and dissenting in part, was more specific: "the term 'compensation' refers to the entire 'package' of benefits – not just cash, but retirement benefits, [and] medical care. . . ." *Id.* at 3 (Scalia, J., concurring in part, dissenting in part).

change a law where such a change directly or indirectly reduces judges' compensation. The decision below relegates judges' rights (and the public interest) under Article III to something less than contract rights, which this Court ordered enforced in *Winstar*.

The majority's holding, of course, has grave implications for the quality of justice in our country. If no salary or other benefit to be received in the future is protected by Article III, the recruitment and retention of judges will be hampered and the independence of the Judicial Branch will be compromised. The panel majority acknowledged that this reading was "regrettable" (App. 25, 41), but they concluded that it follows from "the rule of *Will*" (*id.*).

To validate their holding, the panel majority misconstrued, to the point of distortion, a number of critical statements in the Court's Opinion in *Will*. For example, the *Will* Court used the term "vested" to explain when an element of compensation becomes constitutionally protected. The majority below acknowledged that vesting is a future interest concept and that "garden variety future interests" law supports the plaintiff-judges' argument, *i.e.*, vesting occurs from the date of statutory enactment. (App. 24, 36). The majority concluded, however, that the *Will* Court "departed from the traditional vesting rules" and adopted a special rule, applicable only in Compensation Clause cases, that makes vesting synonymous with "*actual possession.*" (App. 24 (emphasis in original)). Of course, if the *Will* Court had intended "vested" to mean "in possession" (the ultimate *present* interest), it would not have used a term commonly used to define a *future* interest. Certainly, it would not have done so without explaining that it was "depart[ing] from traditional vesting rules . . . ," as the majority believes. (*Id.*).

The panel majority reached their conclusions, in large part, based on this Court's statements in *Will* (1) that

Congress may "alter a procedure for calculating salaries" before that procedure is "executed" (meaning before the salaries are fixed); and (2) that the Court cannot "command Congress" to carry out a "future intent" with respect to salaries (meaning courts cannot compel Congress to enact a law). 449 U.S. at 228. But here, petitioners are not claiming that Congress should be compelled to enact a law (Congress did so when it enacted the Ethics Reform Act); petitioners are asking that a duly enacted law be enforced.

The majority's interpretation of the Compensation Clause also dismisses as irrelevant the fact that the same law that mandates COLAs imposes limitations on judicial income from outside sources. The majority chose to disregard the income limitations because, in their view, there is no limit on the powers of Congress to reduce any "nonjudicial" compensation of judges; Article III protects only judicial compensation. (App. 37). Presumably then, Congress may limit or reduce judges' outside income in any way it desires without offending the Compensation Clause; it could even prohibit judges from receiving income from privately held investments. And, under the majority's view, Congress could do so while withholding otherwise authorized benefits intended to offset the limitations. These inequitable circumstances were dismissed by the majority as merely a part of the "harsh bite" of *Will*. (App. 27).

The panel majority admits the obvious: their holding deals a devastating blow to the morale and vitality of the judiciary, which depends upon "a deliberate, consistent, and fair approach to routine cost-of-living salary adjustments." (App. 41). They also admit that the holding is contrary to the clear intent of the 101st Congress when it adopted the Ethics Reform Act. (App. 20). The majority found, however, that "so long as the Supreme Court

permits the rule of *Will* to survive," there is no judicial remedy to enforce the mandates of the Ethics Reform Act. (App. 25-26).

In his dissenting opinion, Judge Plager demonstrated that the majority had misread *Will* (App. 46-52) and had failed to apply the Compensation Clause as intended by the Founders. (App. 79-85). At least three other judges of the Federal Circuit agreed with Judge Plager. They urged that the Federal Circuit hear the case *en banc* and they took the extraordinary step of issuing dissenting opinions from the decision not to do so. (App. 151-62). In their dissents, they underscored the vital importance of the case and they convincingly articulated the reasons why the majority opinion was wrong. Thus, four of the six members of the Federal Circuit who expressed an opinion on the merits agreed that the legislation that stopped payment of COLAs mandated by the Ethics Reform Act diminished judges' pay in violation of the Compensation Clause. All four dissenting judges agreed that there was nothing in this Court's opinion in *Will* that compelled the result reached by the panel majority.[9]

The panel majority responded to the dissenting opinions by asserting that, if they have misread *Will*, "the Supreme Court will have the opportunity to correct the error." (App. 164). Petitioners respectfully submit that the panel majority's call for help in this regard must be heeded.

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[9] The fact that distinguished jurists do not agree on the proper interpretation of such an important case (*Will*) is, in and of itself, justification for review.

II. THE ECI ADJUSTMENTS MANDATED BY THE ETHICS REFORM ACT ARE A VESTED COMPONENT OF JUDGES' COMPENSATION AND ARE PROTECTED BY ARTICLE III.

Petitioners respectfully submit that this Court should grant review because the district court and the dissenters in the court of appeals are correct: Article III protects judges' statutory compensation, including those portions of that compensation not currently being received.

A. The Legislative And Executive Branches Have The Power To Preserve The Independence Of The Judiciary And To Promote The Purposes Of Article III By Legislating Future, Inflation-Based Salary Adjustments.

The purpose of Article III, Section 1 was to perfect the basic plan of the Constitution to make each branch of government separate from and independent of the others. The Framers recognized that nothing less than tyranny would result if one branch could control or dominate another, particularly the judiciary. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57-58 (1982) (quoting *The Federalist* No. 47 (James Madison)).

As this Court explained recently in its opinion in *United States v. Hatter*, the Founders were aware, from firsthand experience, that judges would not be independent if either the Executive or Legislative Branch could control their tenure or compensation. *See Hatter*, slip op. at 8-10.

In *Hatter*, this Court cited and quoted the most reliable sources of the drafters' intent, Alexander Hamilton and James Madison, to show that the Compensation Clause was designed to free judges from dependence on the legislature for the maintenance of their compensation. *See* slip op. at 8-9. Hamilton knew that *"a power over a*

man's subsistence amounts to a power over his will." The Federalist No. 79, at 472 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis in original). Thus, he observed: "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support." *Id.*

Madison gave a similar account of the Convention's thinking and warned of a dependence on the legislature because of its discretion over the "pecuniary rewards" of the other departments, which gives the legislature "greater facility to encroachments" upon the others. *The Federalist* No. 48, at 310 (James Madison). Madison also made it clear that "emoluments annexed to their Offices," not just salary, were to be protected. *Id.* No. 51, at 321. The Founders therefore resolved "to put it out of the power of [the Legislative Branch] to change the condition of the individual [judge] for the worse." *Id.* No. 79, at 473 (Alexander Hamilton).

Petitioners submit that our courts, particularly this Court, have promoted these objectives through the application of a straightforward principle announced almost two hundred years ago in the first reported case to consider the Compensation Clause: Once a component of judges' pay is enacted into law it "vests" or becomes a part of judges' compensation protected by Article III. *United States v. More*, 7 U.S. (3 Cranch) 159 (C.C.D.C. 1803) (Marshall, C.J. concurring):[10] In that court's words: "[I]f his compensation *has once been fixed by law*, a subsequent law for diminishing that compensation . . . cannot affect [a sitting judge] . . . " *Id.* at 161 (emphasis supplied).

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[10] Chief Justice Marshall sat on the appellate panel and concurred in the opinion of the court.

This same principle was announced by this Court in the first Compensation Clause cases to come before the Court. *Evans v. Gore*, 253 U.S. 245 (1920) and *Miles v. Graham*, 268 U.S. 501 (1925). Although these cases were subsequently overruled for their specific holdings (that judges' salaries could not be taxed), the underlying principles espoused by the Court there, particularly in *Evans*, continue to define the scope and meaning of the Compensation Clause. *See* discussion in *Hatter*, slip op. at 8-10.

In *Evans*, the Court defined broadly the compensation to be protected against *all* forms of diminution: "But all which by their necessary operation and effect withhold or take from the judge *a part of that which has been promised by law* for his services must be regarded as within the prohibition. Nothing short of this will give full effect to its spirit and principle." 253 U.S. at 254 (emphasis supplied).

Miles added to the discussion of *Evans* by describing further the compensation "promised by law."

> The words and history of the clause [article III, section 1] indicate that the purpose was to impose upon Congress the duty definitely to *declare what sum shall be received* by each judge out of the public funds *and the times for payment*. When this duty has been complied with *the amount specified becomes the compensation which is protected* against diminution during his continuance in office.

Miles, 268 U.S. at 508-09 (emphasis supplied).[11]

Petitioners respectfully submit that this Court's opinion in *Will* is consistent with these principles. In *Will*, salary adjustments that were established by law were protected. (*See* discussion *infra* pp. 25-28). Congressional

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[11] This description is quoted with approval in *Atkins v. United States*, 556 F.2d 1023, 1044, 1060 (Ct. Cl. 1977).

efforts to repeal adjustments fixed by law were held invalid because they "purported to revoke an increase in judges' compensation *after* those *statutes* had taken effect." *Will*, 449 U.S. at 230 (emphasis supplied).

Petitioners further submit that this protection extends to salaries *fixed*, but not yet received, particularly where, as here, the intention of Congress in setting the future salary level is to preserve the real value of judges' pay. There is nothing in this Court's opinion in *Will* to suggest otherwise. To the contrary, the Court in *Will* (and again in *Hatter*) pointed out that the Founding Fathers were "well aware of the phenomenon of inflation" and were concerned that inflation could compromise the independence of the judiciary. *Will*, 449 U.S. at 219-20; *see Hatter*, slip op. at 21. The Founders decided against adopting an indexing scheme in the Constitution, however. Instead, they left it to the discretion of Congress to adjust judicial salaries as circumstances require. *Hatter*, slip op. at 21. The *Will* Court pointed to this history and concluded that the Court could not *require* Congress to adopt an indexing scheme. *See* 449 U.S. at 228 n.33. The Court did not say or even imply that Congress could not elect to do so or otherwise fix future salaries to protect the judiciary from inflation.

B. Unlike The Process Established By The Prior Law, The Ethics Reform Act Provided For Cost-Of-Living Adjustments By Legislating Future Salary Levels.

The Ethics Reform Act was only the second attempt by a Congress to deal with the impact of inflation on judges' salaries. The first attempt was the 1975 Adjustment Act, Pub. L. No. 94-82, 89 Stat. 419 (1975), the statute at issue in *Will*. That effort did not work, primarily because the adjustments anticipated by that system

were not automatic or guaranteed. The 1989 Act was designed to cure that deficiency.[12]

Proponents of the Ethics Reform Act pointed out that Congress' failure to provide COLAs posed a threat to the quality and independence of the federal bench. The Judicial Conference of the United States passed a unanimous resolution urging Congress to address the problem of inadequate pay for judicial officers. *See* 135 Cong. Rec. H5262 (1989). This issue was described as the "single greatest problem facing the Judicial Branch today." *Id.* The Judicial Conference resolution called for an increase in judicial salaries and the enactment of measures that would "assure that judicial officers receive . . . [COLAs] similar to those received by other government personnel." *Id.* The Resolution noted that judges' loss of purchasing power made it increasingly difficult to attract and retain highly qualified people on the bench and undermined the concept of life tenure. *Id.*

The 1989 Quadrennial Commission and the Bipartisan Task Force on Ethics, the special committee whose recommendations resulted in the Ethics Reform Act (*see* App. 74-79, 117), issued reports in which they expressed similar concerns. *See* Report of 1989 Commission on Executive, Legislative and Judicial Salaries, *Fairness for our Public Servants* at 27 (1988) (the loss of purchasing power of judicial salaries is "threatening to diminish the quality

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[12] The panel majority sees no substantive differences in the two Acts. (Like the 1989 Act, the 1975 Act "guaranteed an annual automatic COLA. . . . " (App. 29)). The Court in *Will* held to the contrary: the 1975 Act guaranteed nothing. (*See infra* p. 26). As the dissents point out, the majority's failure to see the vital differences in the two statutes is, in large part, the basis for their misapplication of this Court's decision in *Will*. (App. 52; 151-58).

of justice in this country. . . . ") [hereinafter "1989 Quadrennial Commission Report"]; Task Force Report, 135 Cong. Rec. H30,752 (1989) (as a result of this loss of purchasing power, "Federal Judges are resigning at a higher rate than ever before. . . . "). The principal cause of the crisis described by these Reports was the ineffectiveness of the then existing procedures for annually adjusting judges' pay. The 1975 Adjustment Act did not actually fix pay, it merely provided a vehicle for Congress to do so each year, by tying judicial salaries to the process used to annually adjust the salaries of General Schedule positions. *See id.* at H30,752; *Will*, 449 U.S. at 203.[13] Under this process, the President was to submit a recommendation, based on the report of an agent, or an Alternative Plan, prior to September 1. The President's plan would become law unless it was vetoed by either House of Congress within thirty days.[14] *Id.* During that period, the President's recommendation was subject to "Congressional acceptance, disapproval or modification." 1989 Quadrennial Commission Report at 35. Until September 30, therefore, there was no law in place fixing the new salaries. The statutes increasing salaries took effect October 1 of each year. *Will*, 449 U.S. at 230; *American Fed'n of Gov't Employees, AFL-CIO v. Reagan*, 806 F.2d 1034, 1041 (Fed. Cir. 1986).

The Task Force Report found that this procedure of annually fixing the new salary levels subjected judges to

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[13] The Court in *Will* described this procedure and explained that, in adopting the 1975 Adjustment Act, Congress did not "alter the *compensation* of judges; it modified only the *formula* for determining the compensation." 449 U.S. at 227 (emphasis in original).

[14] The one house veto provision was later held unconstitutional. *American Fed'n of Gov't Employees, AFL-CIO v. Reagan*, 806 F.2d 1034 (Fed. Cir. 1986).

"political gamesmanship" (135 Cong. Rec. H30,752) and made judges "vulnerable to . . . riders to appropriations bills to deny them COLAs when other Federal employees receive theirs." *Id.* at H30,753. The Task Force proposed, therefore, that a new system be adopted to eliminate the gamesmanship and to ensure that judicial COLAs are actually paid.

To be clear, the need for a law that actually fixed future salaries went beyond the important goal of extricating judges' pay from the political pressures that led to congressional actions barring their payment in several years. The 1975 Adjustment Act posed a problem for the Legislative Branch as well. In 1989, ratification of the 27th Amendment[15] was imminent. This Amendment would prevent Congress from enacting a pay increase for Members of Congress that would "take effect" during a current term. In other words, the legislative authority to adjust congressional salaries would have to be enacted in a year separated (with an election intervening) from the year the increases were received. Thus, Congress would no longer be able to receive COLAs under the 1975 Adjustment Act because, as *Will* held, a separate statute setting salaries (based on the President's submission) went into effect each year. Accordingly, there could be no intervening election between the effective date and the date the salaries were received. It was imperative, therefore, that the entitlement to future COLAs be "in place" before the years in which those increases would be received. (*See* discussion *infra* pp. 22-23).

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[15] The 27th Amendment provides: "No law, varying the compensation [of Members of Congress], shall take effect until an election of Representatives shall have intervened." U.S. Const., amend. XXVII.

The Task Force urged automatic annual COLAs beginning January 1, 1991. The Task Force also recommended that limitations be imposed on the outside income that could be earned by a judge from teaching or writing and urged that honoraria be prohibited. Significantly, these limitations were "interrelated" to the COLAs. *See* 135 Cong. Rec. S29,686 (1989) (statement of Sen. George Mitchell); *see also* 135 Cong. Rec. H29,484 (1989) (statement by Task Force Co-Chair, Rep. Lynn Martin: "a comprehensive and interrelated package . . . one-bill indivisible."); *Boehner v. Anderson*, 809 F. Supp. 138, 141 (D.D.C. 1992).

Congress adopted the recommendations of its Task Force by passing the Ethics Reform Act on November 30, 1989. The new law represented a "fundamental departure from the [prior] system." Task Force Report, 135 Cong. Rec. H30,752. Whereas, under the 1975 Act, judges were merely "eligible"[16] for annual adjustments, the new Act would lawfully provide for these adjustments. *Id.* at H30,757. The payment of annual COLAs to judges was now mandated by statute, subject only to the condition that the salary levels of General Schedule employees be adjusted in the same year.

The first judicial interpretation of the new Act came in *Boehner v. Anderson*, 30 F.3d 156 (D.C. Cir. 1994), a suit alleging that, as to Members of Congress, the new COLA provision violated the 27th Amendment. The plaintiffs in that case argued that each COLA was a separate legislative act which "varied the compensation" during a current term. *Id.* at 161. The Executive Branch, the Senate and the House appeared in *Boehner* and opposed the suit.

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[16] Despite this clearly expressed intent to change the law, the panel majority found that, under the new Act, judges are still merely "eligible" for increases. (App. 11).

All argued that, unlike the 1975 Adjustment Act, each annual adjustment under the Ethics Reform Act was not a new law varying pay because the COLA provisions of the Ethics Reform Act became law [were fixed] in 1989. Thus, the Congress sitting *at that time* properly fixed the salaries of future Congresses.

The court of appeals in *Boehner* agreed with the Executive and Legislative Branches and held that the 1989 Act fixed future salaries. *Id.* at 162. The court noted that one Congress could specify the salary of a future Congress, and the Court saw "no reason whatsoever why Congress cannot specify an index or formula" instead of a specific dollar amount. *Id.* The court concluded: "In sum, it has been the law since 1989 that a COLA would be made on January 1, 1991, and each year thereafter. . . . " *Id. See also Shaffer v. Clinton*, 54 F. Supp. 2d 1014, 1025 (D. Colo. 1999) (same).

As a matter of statutory interpretation, the opinions of the panel majority and the dissenters below fully agree with the *Boehner* court: the government's commitment to pay annual COLAs to the judiciary is chiseled in legislative stone. As the panel majority explained, the intent of Congress that these payments be made was "clear and beyond any possible doubt: federal judges were to receive COLAs . . . whenever COLAs were awarded to the General Schedule." (App. 35). Under the new Act, "once a determination was made by Congress in a given year that a COLA would be paid to federal employees in the General Schedule, a COLA *became payable* to federal judges." (App. 3 (emphasis supplied)).

The majority below held, however, that, for Compensation Clause purposes, Congress' intention to set future salary levels was irrelevant; the COLA mandated by the 1989 Act was merely a "wish" (App. 20), because it could be repealed or suspended by a later Congress, even after

the condition for payment of a COLA in any year had been satisfied and the COLA had *become payable*.

The panel majority acknowledged that, in each of the years in issue, the condition for payment had been satisfied: "everything necessary" for the statutorily mandated payments had occurred before the blocking legislation was passed, "except for the passage of time. . . . " (App. 23). Thus, before Congress moved to block payment on September 30, 1994 (App. 179), the lawful salary for a district judge for calendar year 1995 was set at $136,300. The blocking statute had the effect of reducing judges' statutory salaries to the 1994 levels.[17] The panel majority held that this direct reduction of judges' pay did not violate the Compensation Clause because the "rule of *Will*" simply "overwhelm[s] the intent" of the 101st Congress (App. 36), and allows a later Congress to reduce judges' statutory salaries so long as it does so before judges begin receiving the new level (*e.g.*, $136,300) in their "paychecks" (App. 25).

Petitioners submit that the panel majority below has misread *Will* and respectfully urge this Court to correct that error. Petitioners further pray that, if the panel majority has read *Will* correctly, this Court should overrule any part of that decision that prevents Congress from establishing by law a future pay adjustment for judges to remedy salary erosion caused by inflation.

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[17] The blocking statutes acknowledged, by their language, that the General Schedule adjustments had taken effect: "No adjustment [under the Comparability Act] shall be considered to have taken effect." (App. 179-80). In significant contrast to this case, the repealing statutes in *Will* referred to the COLA implementations in the future tense, the adjustments, which ordinarily go into effect on October 1, "shall not take effect." 449 U.S. at 206-07.

C. *Will* Does Not Hold That The Compensation Clause Protects Judges' Current Salaries Only.

In *Will*, this Court was called upon to interpret the 1975 Adjustment Act. That Act was designed to provide comparability payments to judges and others. But, in certain years, the then-sitting Congress enacted legislation to prevent the operation of the Adjustment Act. The plaintiffs in *Will* argued that these statutes diminished their compensation and were, therefore, unconstitutional. Their theory was that, when the 1975 Act was adopted, future salaries were fixed by that enactment and could not, therefore, be withdrawn. In response, the government argued that the adjustments were not protected because they had not yet taken effect. (Brief of United States, pp. 20-21, 51-59).

It is significant here that in *Will* the government did not argue that increases were not protected until they were received. To the contrary, in both his opening and reply briefs, the Solicitor General acknowledged that the Compensation Clause protects not only compensation actually received, but also amounts not yet paid so long as the statute providing the benefit is in effect.

> Nor do we contend that the Compensation Clause is limited to compensation that has already been paid. . . . Again, as noted in our opening brief (U.S. Br. 56 n.47), "the Compensation Clause extends to elements of judges' compensation *that have gone into effect but have not yet been paid*. . . . "[18]

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[18] In *Hatter*, the Solicitor General again described the compensation protected by Article III as "Judges' Salary Stated In Law" (Brief of the United States, p. 28) and described this Court's holding in *Will* as follows: "In *Will*, the Court held that Congress may not withdraw an increase in statutory judicial

(Reply Brief for the United States, p. 11 n.16 (emphasis supplied)).[19]

In determining what is and what is not protected compensation, the *Will* Court invoked a well-known future interest concept, "vesting," to describe the point at which a judge's right to each annual adjustment would attach under the statute before the Court. It posed the question it had to resolve: did the increases provided for by the 1975 Act vest "when the formula was enacted or when the increases took effect?" 449 U.S. at 221. The Court then carefully analyzed the statute that created the formula to determine whether Congress intended to fix future salaries or to merely provide a vehicle for future Congresses to do so when inclined to invoke the formula. *Will*, 449 U.S. at 227-28. The Court concluded that the 1975 Adjustment Act did not fix future salaries, but was merely a vehicle for doing so. No rights vested, therefore, when the Adjustment Act was adopted. The plaintiffs in *Will* thus failed in their primary premise, *i.e.*, that the adoption of the formula itself created an entitlement, protected by the Compensation Clause.

This ruling did not terminate the plaintiffs' case, however. Even if the enactment of the formula did not establish a protected right, implementation of the formula in any given year could. In certain of the years at issue in *Will*, Congress and the President had invoked the formula and had fixed judicial salaries for those years, before the nullifying statute was adopted. For example, for FY 1980

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salaries once it has gone into effect, but that Congress may cancel a prospective statutory salary increase before it takes effect." (*Id.*, p. 21).

[19] The Solicitor General was responding to arguments by the plaintiffs and their amicus that accused the government of taking a cash-in-hand approach, similar to that adopted by the majority below.

(Year 4 in the Court's opinion), the nullifying statute was not enacted until October 12, 1979, twelve days after the President's recommendation became law. The nullifying statute was invalid because it purported to revoke an increase in judges' compensation after the statute establishing the increase had taken effect. *Id.* at 230. The plaintiffs prevailed in another year (Year 1) for the same reason. *Id.* The salary increase was "already in force" and could not be reduced. *Id.* at 225.

In the other two years considered by the Court in *Will* (Years 2 and 3), the statutes that prevented operation of the Adjustment Act were enacted *before* the law fixing the new salary levels went into effect on October 1. There was, thus, no increase "in force" in those years. *Id.* at 224-25.

Petitioners respectfully submit that there is only one conclusion that can follow from a reading of the *Will* Court's decision in light of the history and purposes of the Compensation Clause: Once compensation of an Article III judge has been fixed by law, that compensation "vests", *i.e.*, becomes the compensation which is protected against diminution. (*See supra* pp. 16-18).

The panel majority reads this Court's opinion in *Will* to hold that no rights vest until the new salary is *received*.[20] But, the *Will* Court never said that. Moreover,

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[20] Under the 1975 Act, salary adjustments became law at 12:00 a.m. on October 1 of each year. For judges, who are paid on a monthly basis, the newly enacted increases began to accrue later that same day. The Court held in *Will* that adjustments could not be blocked after 12:00 a.m. on October 1. The panel majority assumes that the basis for the Court's ruling was that the new salaries began to accrue on October 1. They attach no special significance to the fact that the increases *became law* earlier that day. But, as demonstrated above, it is the legal entitlement, not the receipt, that is crucial to vesting.

the Court's use of the concept of "vesting" recognized that entitlements due in the future can nonetheless be vested. The "rule" the panel majority finds in *Will* – requiring "actual possession" before vesting – is simply not there.

Moreover, if the *Will* Court had intended to hold that only current salary is protected, it would not have gone to the effort of analyzing the 1975 Act to determine whether that Act actually fixed salaries or was merely a "method" for doing so. *See* 449 U.S. at 228. Under the panel majority's reading of *Will*, this analysis was a meaningless exercise. The Court could simply have said that legislatively-mandated salary increases are not protected until *actually possessed*.

As the dissenting opinions here demonstrate, the Ethics Reform Act is different from the statute before the Court in *Will* in every relevant respect. The future adjustments under the Ethics Reform Act were fixed by law when that statute was enacted. The right to the adjustments mandated by that Act, therefore, vested when that statute became law or, at the latest, when the one condition for payment (adjustment of General Schedule salaries) occurred.[21]

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[21] The district court held that judges' entitlement to annual COLAs under the Ethics Reform Act "vested on January 1, 1991 [the effective date of the Act], subject to only one condition, that such an adjustment be given to General Schedule employees for the same year." (App. 131). Petitioners also argued, in the alternative, that vesting occurs each year when the condition is fulfilled. Since, in each of the years at issue, the condition was met before the blocking statute was enacted, petitioners would prevail under either argument.

III. THE BLOCKING STATUTES DISCRIMINATE AGAINST JUDGES IN VIOLATION OF ARTICLE III.

This Court should grant review because the challenged statutes discriminate against judges in violation of Article III, Section 1. In their complaint, petitioners alleged that the refusal to pay COLAs to judges at times when COLAs were paid to millions of other career federal employees was discriminatory in violation of Article III. (App. 187-88). In its recent opinion in *Hatter*, the Court explained that the Compensation Clause protects judges from discriminatory treatment in matters relating to compensation. Slip op. at 14.

In each of the years at issue in this case, virtually every federal employee, including rank and file military personnel and General Schedule employees, received a pay adjustment. Out of these millions of employees, only judges, Members of Congress and a relatively small number of other high ranking employees were denied COLAs. By treating judges differently than virtually all other career federal employees, Congress unconstitutionally discriminated against judges.

In light of the *Hatter* decision, the court of appeals should have granted rehearing to address the only question that needs to be resolved in order to determine whether Congress' refusal to pay the promised ECI adjustments constituted unlawful discrimination in violation of the Compensation Clause, *i.e.*, whether the inclusion of a relatively small number of high ranking officials in the blocking statutes adequately distinguishes this case from *Hatter*. Petitioners respectfully submit that if the *Hatter* decision is to have any real meaning, in terms of the protections afforded under Article III, this question must be answered in the negative.

CONCLUSION

Petitioners respectfully submit that, for all of the above reasons, the petition for certiorari should be granted.

Respectfully submitted,

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